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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. [redacted] 140

EVANGELOS PAPANIKOLAOU,

Petitioner

VERSUS

ATLANTIC FREIGHTERS, LTD., and S. LIVANOS SHIPBROKERS, LTD., both foreign corporations or associations, as owners and/or operators of the Liberian Steamship "ATLANTIC COAST",

Respondents

ON OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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June 25, 1956.

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INDEX

Page

EXCEPTIONS TO JURISDICTION OF COURT 1

THE SOLE QUESTION PRESENTED 3

ISSUE 3

Does a State Trial Court Have the Discretion and Authority to Decline Jurisdiction of the Subject Matter in An Attachment Proceeding Between An Alien Seaman and An Alien Shipowner, Wherein the Alleged Causes of Action Did Not Arise Within the Commonwealth of Virginia

STATEMENT OF THE CASE 3

ARGUMENT—

A. A State Trial Court Is Empowered with the Discretionary Authority to Decline Jurisdiction of the Subject Matter in An Attachment Proceeding Between An Alien Seaman and An Alien Shipowner Wherein the Alleged Causes of Action Did Not Arise Within the Commonwealth of Virginia 9

B. The Constitutionality of the Virginia Attachment Statute (8-524.1) Is a Moot Question and Cannot Be Attacked Collaterally 14

C. The State Trial Court Properly Declined Jurisdiction Without Qualification 16

CONCLUSION 17

TABLE OF CASES

	Page
Adkins v. City of Richmond (1900), 98 Va. 91, 34 S.E. 967	15
The BELGENLAND (1885), 114 U.S. 355, 5 S.Ct. 860	13
Elizabeth M. Brookhouse v. Cunard White Star, Ltd. et al, 1948 A.M.C. 760	11
Canada Malting Co., Ltd. v. Paterson Steamships, Ltd. (1932), 285 U.S. 413, 52 S.Ct. 413	12
Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd., 281 U.S. 515, 50 S.Ct. 400, 74 L.Ed. 1008	13
The FLETERO (1953, 4th Cir.), 206 F. (2d) 267	13
Garrett v. Moore-McCormack Co., Inc. (1942), 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239	14
Heros v. Cockinos (1949 4th Cir.), 177 F. (2d) 570	13
Hodges v. Richmond Cedar Works (1917), 120 Va. 492, 91 S.E. 644	15
Saad Mohamed H. Aly v. The Alexandria Navigation Co. and American Export Lines, Inc., 1943 A.M.C. 1134; 43 N.Y. Supp. (2d) 1949, Appeal Dismissed 52 N.Y. Supp. (2d) 784	10
Randall v. Board of Commissioners of Tippecanoe County, etc. (1923), 261 U.S. 252, 43 S.Ct. 252	2
Rust Sand & Lumber Co. v. Jackson et al, 250 U.S. 71, 39 S.Ct. 424, 63 L.Ed. 850	2
Sanderlin v. Smyth (4th Cir. 1943), 138 F. (2d) 729	15
Toledo Scale Co. v. Computing Scale Co. (1923), 261 U.S. 399 43 S.Ct. 458, 67 L.Ed. 719	2
Traux v. Raich (1915), 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131	13
United States v. Brady (4th Cir. 1943), 133 F. (2d) 476	15
Waller v. Commonwealth, 178 Va. 294, 16 S.E. 2d 808	16
Western Union Telegraph Co. v. Hughes (1906), 203 U.S. 505, 27 S.Ct. 162, 51 L.Ed. 294	2

TEXT BOOKS

21 C.J.S. page 117	10

STATUTES

28 U.S.C.A. 2101 (c)	2
Title 8, Sec. 524.1 (Va. Attachment Statute)	4

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ON OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

I. EXCEPTIONS TO JURISDICTION OF COURT

This petition for writ of certiorari seeks to review a final order denying jurisdiction entered on October 18, 1955 in the Corporation Court of the City of Newport News, Virginia.

The Supreme Court of Appeals of Virginia has heretofore refused to review this case. By order entered in the Virginia Appellate Court on March 6, 1956 a Writ of Error was refused. The effect thereof is to affirm the judgment of the Corporation Court of the City of Newport News, Virginia.

The instant petition for writ of certiorari was filed in the Supreme Court of the United States on June 7, 1956, a period of ninety-three (93) days after the entry of the Virginia Appellate Court's order of March 6, 1956. Under the provisions of 28 U.S.C.A. 2101 (c), petitioner is barred by a limitations period of ninety (90) days from seeking certiorari in this case.

Toledo Scale Co. v. Computing Scale Co. (1923), 261 U.S. 399, 43 S.Ct. 458, 67 L.Ed. 719; *Rust Sand & Lumber Co. v. Jackson, et al* (1919), 250 U.S. 71, 39 S.Ct. 424, 63 L.Ed. 850.

With the exception of the sole issue of the propriety of the Trial Court's action in exercising its discretion to refuse jurisdiction of this case, petitioner is further barred from raising the remaining questions in that the latter queries are improperly directed to the Supreme Court of Appeals of Virginia instead of the Corporation Court of the City of Newport News. *Western Union Telegraph Co. v. Hughes* (1906), 203 U.S. 505, 27 S.Ct. 162, 51 L.Ed. 294; *Randall v. Board of Commissioners of Tippecanoe County, etc.* (1923), 261 U.S. 252, 43 S.Ct. 252.

II. THE SOLE QUESTION PRESENTED

In view of the facts hereinafter set forth, we cannot agree with the statement of errors assigned and issues raised in the petition for certiorari found on page six of petitioner's brief. Manifestly, there is but one issue.

ISSUE

Does a State Trial Court Have the Discretion and Authority to Decline Jurisdiction of the Subject Matter in An Attachment Proceeding Between An Alien Seaman and An Alien Shipowner, Wherein the Alleged Causes of Action Did Not Arise Within the Commonwealth of Virginia?

III. STATEMENT OF THE CASE

(For convenience, simplicity and in order to conform with the designations contained in petitioner's brief, references to the record, as indicated by prefix "R", are to the original record as indexed by the Clerk of the Corporation Court of Newport News. It is noted that the Trial Court's Statement of Facts and the Supreme Court of Appeals' Order are not numbered, although forwarded as part of the record.)

In general the respondent concurs with the summary of the record found on pages three, four and five of the petition for certiorari. However, we feel that there are several important omissions which should be added.

On July 23, 1954, petitioner, Evangelos Papanikolaou, filed a petition for attachment against Atlantic Freighters, Ltd. and S. Livanos Shipbrokers, Ltd., in the Corporation Court of the City of Newport News. In his petition for attachment Panaikolaou, a Greek National, sought damages for personal injuries, wages, maintenance, wage penalties and failure to provide medical care, while employed aboard the Liberian Steamship ATLANTIC COAST, owned and operated by the respondents, both of which were alleged to be alien corporations (R. 1).

However, petitioner did not see fit to attack or proceed under the Virginia attachment Statute, Title 8, Sec. 524-1, which provides that no ship of more than twenty tons shall be attached unless the plaintiff shall have first established to the satisfaction of the Judge of the Court in which the attachment is filed, that he (the plaintiff) has a reasonable expectation of recovering at least one-half of the amount demanded in the petition for attachment. This step can be taken *only* after reasonable notice to the owner, agent or master of the ship, and, at the time of appearance before the Judge, the Court sets the amount of bond necessary to release the ship from the levy of the attachment. The actual terms of the statute are, as follows:

> "Title 8, Sec. 524-1: Attachment of ships, boats and other vessels of more than twenty tons.
>
> No attachment against any ship, boat, or other vessel of more than twenty tons, shall issue unless the plaintiff or someone in his behalf, shall first

establish, to the satisfaction of the judge of the court in which he files his petition for attachment that he has a reasonable expectation of recovering an amount exclusive of all costs, equal to at least one-half the damages demanded in the petition for attachment. Reasonable notice of appearance before said judge shall be given the owner, agent or master of said vessel, and at the time of said appearance the court shall determine the amount of such reasonable expectation of recovery and the amount of bond necessary to secure the release of said vessel if and when a writ be levied in accordance with this section.

No attachment issued in violation of the provisions of this section shall create a valid lien upon the property sought to be attached, and no levy made under authority thereof shall be of any effect."

Papanikolaou refused to proceed pursuant to this statute and by his attorneys obtained issuance of a levy of attachment against all property of the defendants except "ships, boats or other vessels of more than twenty tons". This levy was effected on July 23, 1954 by serving a copy thereof on the local steamship agent for the steamship ATLANTIC BREEZE (a different ship from the steamship ATLANTIC COAST on which Papanikolaou served) and also by serving a copy thereof on the master of the steamship ATLANTIC BREEZE (alleged to be owned and operated by the defendants) which was then in port. Neither the steamship agent nor the master of the steamship ATLANTIC BREEZE was named as co-defendant in the petition for attachment and alleged to be in possession of assets belonging to the defendants, as required by the Code of Virginia, 1950, Title 8, Sec. 525. Nor did the City Sergeant's return reveal or disclose a levy upon

any specific items of property in the hands of the persons served, a serquired by Title 8, Sec. 547 of the Code of Virginia 1950. Timely pleas and motions to quash the purported attachment were filed (R. 11, 13, 15).

Subsequently on December 13, 1954 the timely pleas and motions to quash were argued before the Hon. Herbert G. Smith, Judge of the Court below, who ruled that the purported attachment of July 23, 1954 was void as it did not comply with any of the aforementioned sections of the Virginia Code and was but an attempt to do indirectly what the attachment statute, Title 8, 524.1 prohibits doing directly. An order to this effect was entered on January 28, 1955 (R. 19).

In the interim and during the argument on the motion to quash on December 13, 1954, Papanikolaou's attorneys decided to proceed pursuant to the attachment statute and on that date Judge Smith entered an order (after reasonable prior notice to defendants) fixing a release from attachment bond in the amount of $10,-000.00 (R. 18).

In view of the actions of petitioner's counsel, the several preliminary motions relating to attempted service of process and purported attachments, became and now remain irrelevant and moot as Papanikolaou subsequently proceeded in accordance with the ship attachment statute, Title 8, Sec. 524.1, and the respondents posted the requisite release from attachment bond as ordered by the Court.

Subsequently, on August 19, 1955, an attachment was levied pursuant to statute on the steamship ATLANTIC COUNTESS (alleged to be owned and operated by the same parties or defendants who own and operate the steamship ATLANTIC COAST) which was then in port.

The appropriate release from attachment bond in the amount of $10,000 was posted by the master of the steamship ATLANTIC COUNTESS on August 23, 1955, in accordance with the Court's order.

Thereafter, respondent filed a Plea To The Jurisdiction and Motion to Dismiss (R. 24), which was sustained and resulted in the final order of October 18, 1955, from which this appeal arises.

The Plea to the Jurisdiction and Motion to Dismiss alleged:

1. That Papanikolaou was and is a citizen of Greece;
2. That Atlantic Freighters, Ltd., the owner of the steamship ATLANTIC COAST, is a foreign corporation;
3. That the steamship ATLANTIC COAST is registered under and flys the flag of the Republic of Liberia;
4. That Papanikolaou was employed aboard the steamship at London, England, on August 8, 1953;
5. That Papanikolaou was injured aboard the steamship while at Antwerp, Belgium, on August 15, 1953;

6. That Papanikolaous signed off, or was discharged from the steamship at London, England, on May 5, 1954;

7. That the contract of employment between the parties was not entered into in Virginia nor even in the United States;

8. That Papanikolaous did not allege any causes of action of any nature whatever, arising in Virginia.

The foregoing factual allegations made by respondents were freely admitted by attorneys for Papanikolaou during argument on respondents Plea To The Jurisdiction. The Statement of Facts as certified by the Court below succinctly states this admission in the following language: .

> "On October 18, 1955, respondents' plea to the jurisdiction came on for hearing and was argued fully by respective counsel before the Honorable Herbert G. Smith of the Corporation Court of the City of Newport News, Virginia.
>
> "At that time, respondent's counsel reviewed the separate allegations of Atlantic Freighters, Ltd.'s plea to the jurisdiction which allegations were corroborated substantially by the allegations of libellant's petition for attachment. Libellant's counsel did not deny a single allegation of respondent's jurisdictional exceptions, but took the primary position that an attachment of the rem imposed mandatory jurisdiction upon the Court."

Disagreeing with the theory advocated by attorneys for Papanikolaou, the Corporation Court of Newport News exercised its discretion and authority to decline jurisdiction of the subject matter in this attachment

proceeding between an alien seaman and an alien shipowner wherein the alleged causes of action did not arise within Virginia. To this effect we refer to Paragraph 6 of the Statement of Facts, as follows:

> "Upon consideration of libellant's petition for attachment, respondent's plea to the jurisdiction, the documentary exhibits, and argument of counsel, this Court exercised its discretion to decline jurisdiction of this suit involving a foreign seaman and a foreign ship, in which the petitioner's injury occurred in a foreign port and the other secondary causes of action arose out of the jurisdiction of this Court."

This appeal arises from a final order, dated October 13, 1955, of the Corporation Court of the City of Newport News dismissing the Papanikolaou suit upon jurisdictional grounds. In refusing to review this case, the Supreme Court of Appeals of Virginia has affirmed the Trial Court's discretionary act of declining jurisdiction.

IV. ARGUMENT

In addressing our argument to the Court, we shall first discuss the sole material issue and, thereafter, answer briefly the secondary prints raised in the petition for certiorari.

A. A State Trial Court Is Empowered with the Discretionary Authority to Decline Jurisdiction of the Subject Matter in An Attachment Proceeding Between An Alien Seaman and An Alien Shipowner, Wherein the Alleged Causes of Action Did Not Arise Within the Commonwealth of Virginia.

There is no provision in the Virginia attachment statutes making it mandatory on a Trial Court to accept jurisdiction of the subject matter of a controversy between non-resident aliens. This is particularly true where the alleged causes of action did not arise in Virginia.

On the contrary, in the absence of such a statutory provision, jurisdiction of such actions between non-resident aliens is clearly a matter for the sound discretion of the Trial Court. This rule is clearly stated in 21 C.J.S., page 117, as follows:

> "Court—Sec. 77(b):
>
> .... However, in the absence of a statute to the contrary, whether a court will in a particular instance exercise or refuse to exercise its jurisdiction of actions by non-residents against foreign corporations has been held to be a matter for the sound discretion of the court, at least where the cause of action arose outside of the State."

There are ample rules and precedents for the action taken by the Corporation Court of Newport News both in the State and Federal Courts.

A case directly in point is *Saad Mohamed H. Aly v. The Alexandria Navigation Company, S.A.E., and American Export Lines, Inc.* (Supreme Court, Kings County, New York, Aug. 19, 1943), 1943 A.M.C. 1134; 43 N.Y. Supp. (2d) 1949, Appeal Dismissed 52 N.Y. Supp. (2d) 784. In that case the plaintiff, an alien, (but resident of New York), employed on a foreign flag vessel, owned by an alien corporation, was injured while at sea and enroute to New York City. In declin-

ing jurisdiction of the subject matter, the Court said: 1943 A.M.C. 1135-1136:

> "The Courts of this State are committed to the view that it is within the discretion of the Supreme Court to decline jurisdiction in a case like this and that that discretion should be exercised unless it appears that the action is being prosecuted for the benefit of the citizens of this State (Gregonis v. P&R Coal & Iron Co., 235 N.Y. (152, 160; Murnan v. Wabash Ry. 246 N.Y. 244, 258; Douglas v. N.Y.N.H. & H.R.R., 279 U.S. 377, 387, affirming 248 N.Y. 580.
>
> "For the reasons stated above, defendant's motion for an order declining jurisdiction and dismissing the complaint is granted" . . . .

Another legal precedent similar to the case subjudice is *Elizabeth M. Brickhouse v. Cunard White Star, Ltd. and Furness, Withy & Co., Ltd.* (City Court of the City of New York, Mar. 31, 1948), 1948 A.M.C. 760. In the Brookhouse case, the plaintiff was a resident assignee of a claim (originally held by an alien assignor) against an alien corporation whose steamships called regularly at the port of New York. The cause of action was for breach of a contract of carriage of goods by sea. The contract was not entered into in New York, nor did the shipment touch New York in any manner. The Court held:

> ". . . The plaintiff, a resident assignee of the claim, does not enjoy a more favorable position than an original claimant who moves into a particular jurisdiction for the purpose of starting an action (cases cited)."

It is somewhat unusual and irregular to find a suit of this sort in a State Court. Normally such a suit is found in an Admiralty Court. In this case, Papanikolaou originally instituted a similar suit in Admiralty in the United States District Court at Newport News which was dismissed on jurisdictional grounds and is presently on appeal. Nevertheless, it is in the Admiralty Courts that the abundance of the legal precedent lies regarding the Trial Court's authority to decline jurisdiction.

In the case of *Canada Malting Co., Ltd. v. Paterson Steamships, Ltd.* (1932), 285 U.S. 413, 52 S.Ct. 413, which involved a collision between two Canadian ships within the territorial waters of the United States, this Court sustained the District Court's discretionary act of refusing jurisdiction in the following language:

> "The libellants concede, as they must, that in a suit in Admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction and that the exercise of its discretion will not be disturbed unless abused.
>
> "Obviously, the proposition that a Court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. *Nor is it true of courts administering other systems of our law. Courts of equity and law, also, occasionally decline, in the interest of justice, to exercise jurisdiction where the suit is between aliens or non-residents.*"

For additional precedent, we cite the following cases which recognize the discretionary authority of a trial court in suits such as the case sub-judice:

Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd., 281 U.S. 515, 50 S. Ct. 400, 74 L. Ed. 1008

The Belgenland (1885), 114 U.S. 355, 5 St. Ct. 860
The Fletero (1953) (4th Cir.), 206 F. (2d) 267
Heros v. Cockinos (1949) (4th Cir.), 177 F. (2d) 570.

As the prevailing view, both in the State and Federal Courts, is that a trial court has the discretionary power to refuse jurisdiction of a case between foreigners provided its discretion has not been abused and absent a statute to the contrary, we submit that the sole question herein concerns the propriety of the State Courts discretionary ruling. By refusing to review this case, the Supreme Court of Appeals of Virginia has affirmed the trial court's discretionary act which is not a proper subject of review by this Court.

The case of *Traux v. Raich* (1915), 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, cited on page nine of petitioner's brief is not in point. It involves a suit brought by a *resident* alien in the District Court of Arizona to enjoin the enforcement of an Arizona anti-alien labor law. In discussing the doctrine of the equal protection of the laws under the 14th Amendment, this Court remarked:

> "Being lawfully an *inhabitant* of Arizona the complainant is entitled under the 14th Amendment to the equal protection of its laws."

As a non-resident alien seaman, Papanikolaou would not be entitled to the benefit of the equal protection of the law in any event.

Likewise, *Garrett v. Moore-McCormack Co., Inc.* (1942), 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239, is not in point. That case concerns the right of a seaman to the full scope of his federally created rights where he has been allowed to proceed in a State Court. In the instant suit, Papanikolaou was not allowed to proceed in the State Court.

By way of summary, therefore, it appears that the Virginia attachment statute (Title 8, Sec. 524.1) while imposing jurisdiction over the person (owner) of property *validly* attached, is not mandatory as to jurisdiction of the subject matter in dispute. All legal precedent clearly establishes a power, right and authority in a Trial Court to exercise its sound judicial discretion in accepting or declining jurisdiction of the subject matter of disputes or suits between non-resident aliens, particularly where the alleged causes of action did not arise in the State. There is ample legal precedent and authority for the sound and valid action taken by the Court below.

Therefore, the Corporation Court of the City of Newport News was pre-eminently correct in exercising its discretion in accordance with established rules and precedent, to decline jurisdiction of the subject matter of this controversy between a non-resident alien seaman and a non-resident alien corporate shipowner, where the alleged causes of action did not arise and were in no way connected with the Commonwealth of Virginia.

B. The Constitutionality of the Virginia Attachment Statute (8-524.1) Is a Moot Question and Cannot Be Attacked Collaterally.

In his petition for certiorari, Papanikolaou seeks to attack the constitutionality of the Virginia Attachment Statute (Title 8-524.1).

At no time in the Court below did petitioner attack or raise directly the constitutionality of this statute. It is elementary therefore that he cannot raise that issue on appeal. Moreover, his attempt to do so is in effect a collateral attack, and it is well settled that the constitutionality of a statute cannot be attacked collaterally.

Hodges v. Richmond Cedar Works (1917), 120 Va. 492, 91 S.E. 644

Adkins v. City of Richmond (1900), 98 Va. 91, 34 S.E. 967

Sanderlin v. Smyth (4th Cir. 1943), 138 F. 2d 729
United States v. Brady (4th Cir. 1943), 133 F. (2d) 476.

Furthermore, Papanikolaou has not been injured by the alleged unconstitutionality. He obtained a fair hearing in the Federal Court. He obtained the requisite pre-attachment hearing in the Corporation Court of Newport News when he decided to ask for it, and he obtained the security of a $10,000 bond upon attachment of the steamship ATLANTIC COUNTESS. He cannot in good faith and conscience therefore complain that he has been injured by the statute which he now attempts to attack collaterally.

Unless and until a person is injured by the alleged unconstitutionality of a statute, he will not b allowed to attack that statute *even by a direct and proper attack.* The Supreme Court of Virginia has made this clear on numerous occasions. Chief Justice Campbell stated the

principle clearly in *Waller v. Commonwealth,* 178 Va. 294, 16 S.E. 2d 808, at page 810 wherein he said:

> "In Grosso v. Commonwealth, 177 Va. 830, 13 S.E. 2d 285, 288, Mr. Justice Eggleston said:
> 'It is well settled that one challenging the constitutionality of a provision in a statute has the burden of showing that he himself has been injured thereby. It avails him nothing to point out that some other person might conceivably be discriminated against.
>
> 'As this court said in Carpel of Richmond, Inc. v. City of Richmond, 162 Va. 833, 842, 175 S.E. 316, 319: "Before one can ask that a statute be declared unconstitutional, he must show that he has been injured. Until that has been done, it is, so far as he is concerned, but a moot question." '".

Until Papanikolaou has shown that Title 8, Sec. 524.1 has caused him some injury or harm therefore, the question of its constitutionality remains moot as to him.

C. The State Trial Court Properly Declined Jurisdiction Without Qualification.

In the present suit, Atlantic Freighters, Ltd. posted a $10,000 release bond on August 20, 1955, with the Corporation Court of the City of Newport News. Likewise, in the Papanikolaou suit pending in the Federal Court, respondent furnished libellant with a letter of guarantee in the sum of $15,000 which remains in effect pending the outcome of the appeal in the latter case. At no stage did Papanikolaou's counsel suggest to the Court that Atlantic Freighters, Ltd. be placed on terms concerning the posting of security in any future suit in another jurisdiction.

The case of *Canada Malting Co., Ltd. v. Paterson Steamships, Ltd.* (1932), 285 U.S. 413, 52 S.Ct. 413, does not hold that a trial court must protect the libellant's security in properly denying jurisdiction of the case; but merely notes that the District Court placed the respondent upon terms as to security in that particular suit as an incident of the proper exercise of its discretion.

As an intricate part of the trial court's discretionary decision to refuse jurisdiction, we submit that the final order of the Corporation Court of the City of Newport News dismissing the Papanikalaou suit without qualification was correct and not a proper subject of review.

V. CONCLUSION

Respondent submits that the decision of the Corporation Court of the City of Newport News is eminently correct.

This view is shared by the Supreme Court of Appeals of Virginia which, by refusing to review the case, has affirmed the actions of the trial court.

There is no real conflict of authority as to basic legal principals involved. There are no new or novel questions needing further clarification. The validity of any statute or Treaty of the United States or of any States is not drawn in question. There is no question of general interest warranting the granting of a writ of certiorari in accordance with the petitioner's application.

For these reasons, the decrees of the Supreme Court of Appeals of Virginia and of the Corporation Court of the City of Newport News, Virginia, should not be disturbed and a writ of certiorari should be denied.

Respectfully submitted,

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Norfolk, Virginia
June 25, 1956

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No. 141.

W. HALE THOMPSON, Administrator of the Estate of Miguel Caicedo, Deceased,

Petitioner,

v.

CESAR ENDARA, a non-resident, individually and as Master of the M/V *Ciudad de Bogota,* FLOTA MERCANTE GRANCOLOMBIANA, S. A., a foreign corporation or association, as owner and/or operator of the M/V *Ciudad de Bogota,* G. VALDESPINO, a non-resident, individually and as Master of the Cuban M/V *Bahia de Matanzas,* and EMPRESSA NAVIERA DE CUBA, S. A., a foreign corporation or association as owner and/or operator of the Cuban M/V *Bahia de Matanzas,* and NAVIERA VACUBA, S. A., a foreign corporation or association, as charterer *pro hac vice* of the Cuban M/V *Bahia de Matanzas,*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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W. HALE THOMPSON, Administrator of the Estate of Miguel Caicedo, Deceased,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

STATEMENT OF THE CASE.

On April 13, 1955 the M/V *Ciudad de Bogota,* a Colombian flag vessel, and the M/V *Bahia de Matanzas,* a Cuban flag vessel, came into collision on the high seas at a point some fifteen miles off the coast of North Carolina. Peti-

tioner alleges that as a result of this collision the decedent, Miguel Caicedo, a citizen of Colombia, South America, and a member of the crew of the M/V *Ciudad de Bogota,* was instantly killed. Following the collision the vessels proceeded to Newport News, Virginia for repairs. The body of Miguel Caicedo was removed from the M/V *Ciudad de Bogota* and at the expense of its owners promptly returned to his home in Colombia, South America.

On October 28, 1955, pursuant to notice received from counsel for petitioner, counsel for respondents appeared specially at a hearing before the Judge of the Corporation Court of the City of Newport News, Virginia for the purpose of having the Court fix the amount of bond to be posted pursuant to Section 8-524.1 of the 1950 Code of Virginia. Just prior to or during the hearing, counsel for petitioner delivered to respondents' counsel a copy of a petition for attachment which had been filed with the Clerk of the Corporation Court of the City of Newport News some time during the course of that day. Upon motion of the respondents, the hearing was continued until November 4, 1955.

When the hearing was reconvened on November 4th, counsel for respondents again noted that they were appearing specially. Petitioner attempted, without evidence, to establish a reasonable expectation of recovery for the death of Miguel Caicedo, an amount exclusive of costs, equal to at least one-half of the sum of $100,000.00 as prayed for in the petition. Upon the conclusion of the petitioner's argument, and upon the argument of respondents that the Court was without jurisdiction to entertain a cause of action for death by wrongful act on the high seas, the Court dismissed the petition for want of jurisdiction.

Neither of these two foreign vessels was within the jurisdictional waters of the United States nor the State of Virginia on October 28, 1955 the date on which the peti-

tion for attachment was filed, nor have they been within such waters during the pendency of this cause. The owners of the two colliding vessels, both foreign alien corporations, do not have any assets or places of business within the State of Virginia and neither of them is doing business within the said state. Respondents have not been served with process nor have they made a general appearance in this case. However, on the same day that petitioner filed a petition for attachment in the state court, or shortly thereafter, the same petition was filed, in admiralty, in the United States District Court for the Eastern District of Virginia, Newport News Division. Counsel for respondents have filed a voluntary appearance in that action and the cause is now pending in that court.

The Petition for Writ of Certiorari Should Be Denied For The Following Reasons

1. The petition was filed late. The petition was filed more than ninety days after the entry of the judgment, the period allotted by 28 U. S. C. 2101. The judgment of the Supreme Court of Appeals of Virginia was entered on March 6, 1956 (see Appendix, *infra*, p. 7) and the petition for writ of certiorari was filed on June 7, 1956. The intervening period was then ninety-three days. Cf. *Dept. of Banking* v. *Pink*, 317 U. S. 264.

2. The Corporation Court of the City of Newport News, Virginia, had no jurisdiction under The Death on the High Seas Act. 46 U. S. C. 761, provides in part that "Whenever the death of a person shall be caused by wrongful act . . . occurring on the high seas . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty . . ." This

section creates a right of action which did not exist at common law and clearly sets forth that the right is to be enforced by the personal representative of the decedent who may bring a cause of action for damages in the district courts of the United States, in admiralty. Petitioner has complied with this section by filing the same suit in the United States District Court for the Eastern District of Virginia, Newport News Division, bearing admiralty docket No. 243. It has become so well established as to be considered a maxim of the law that where a statute creating a right also provides a remedy, the right may be enforced only according to the terms of the statute. This principle was stated in *Galveston H. & S. A. Ry. Co.* v. *Wallace*, 223 U. S. 481, where, at page 490, the court stated:

> "* * * Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. * * *"

A comprehensive analysis of The Death on the High Seas Act is found in *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85, (N. D. Cal.). A cause of action was brought in a state court to recover damages under the California Wrongful Death Statute for death of an airline passenger as a result of a crash on the high seas. After the case was removed to the civil side of the United States District Court, defendant moved to dismiss the suit on the grounds that plaintiff's only remedy was in admiralty under 46 U. S. C. 761. The court granted defendant's motion and held that the state court had no jurisdiction to entertain the suit under the The Death on the High Seas Act, at law.

3. The Corporation Court of the City of Newport News, Virginia, did not abuse its discretion in denying jurisdic-

tion of a cause of action between aliens arising outside of the jurisdiction of the United States. The trial court in the exercise of its discretion can refuse to accept jurisdiction of a cause of action between non-resident aliens arising outside of the State of Virginia. If such were the case, the issue would be whether there was an abuse of discretion by the Corporation Court of the City of Newport News, Virginia.

When we consider the facts of this case with reference to the applicable principles of law it becomes apparent that there was no abuse of discretion by the Corporation Court of the City of Newport News, Virginia, but to the contrary, it was justified in refusing to accept jurisdiction. None of the authorities cited by petitioner support the proposition that a state court is obliged to assume jurisdiction over a controversy involving a Colombian seaman and a Colombian vessel and a Cuban vessel and their owners in a cause of action arising on the high seas. The general rule is stated in 21 C. J. S. Courts, Sect. 77 (b):

> "* * * However, in the absence of a statute to the contrary, whether a court will in a particular instance exercise or refuse to exercise its jurisdiction of actions by nonresidents against foreign corporations has been held to be a matter for the sound discretion of the court (citing authorities), at least where the cause of action arose outside the state." (Citing authorities).

On appeal petitioner was obliged to show that the decision of the trial court was based upon wrong principle or that it has acted contrary to precedent. *The Belgenland*, 114 U. S. 355, 368. Petitioner has had an opportunity to convince the Supreme Court of Appeals of Virginia that there was error, an abuse of discretion, that claimant suffered some injustice, or that claimant has been prejudiced

by the decision. After a mature consideration of the case the Supreme Court of Appeals of Virginia affirmed the decree of the trial court "* * * being of the opinion that the said decree is plainly right * * *". This determination relates to the inherent authority of a tribunal of the state existing under the constitutional power of the legislature of the state. Such determination is plainly not reviewable by this court. In any event, the same complaint is now pending in the United States District Court for the Eastern District of Virginia, Newport News Division.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND T. GREENE,
Counsel for Respondents.

GEORGE L. VARIAN,
STEPHEN J. BUCKLEY,
GUILFORD D. WARE,
HUGH S. MEREDITH,
of Counsel.

July 6 1956

APPENDIX.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 6th day of March, 1956.

The petition of W. Hale Thompson, Administrator of the Estate of Miguel Caicedo, deceased, for an appeal from a decree entered by the Corporation Court of the City of Newport News on the 7th day of November, 1955, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and Cesar Endara, etc., et al., were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the Court being of opinion that the said decree is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said Corporation Court.

A copy, Teste:

H. G. TURNER,
Clerk.